INDEX.

	Page
Petition for Writ of Certiorari	1
Opinion of the Court Below	2
Statement of the Case	2
Reasons Relied on For Allowance of the Writ	4
Prayer for the Writ	5
Appendix	6
Collection of Policy Provisions Cited in the Opinion of the Court Below	6
Brief in Support of Petition for Writ of Certiorari	11
Specification of Errors	11
Argument	12
A. Analysis of the Duesenberg Cases	12
B. Premium on Sindelar's Salary	17
C. Analysis of Clause Five	19
D. The language of the Standard Policy is plain and unambiguous	21
E. Analysis of Opinion of Court Below	24
Point 1	24
Point 2	25
Point 3	27
Point 4	29
Point 5	30
Point 6	30
Point 7	37
Point 8	39
CONCLUSION	42

Page

TABLE OF CASES.

Am. Constr. Co. v. Jacksonville Ry., 13 S. C. Rep. 758, 148 U. S. 372 ..... 4, 5
Am. Mut. Liab. Co. v. Duesenberg, 14 N. E. (2d) 919, 4, 12, 27, 39
Am. Mut. Liab. Co. v. Duesenberg, 16 N. E. (2d) 698, (Rehearing) 12
Am. Stevedores Inc. v. Porello, 67 Sup. Ct. 847.....37, 38
Amal. Roofing Co. v. Travellers, 300 Ill. 487 27
Bituminous Corp. v. Powell, 194 N. E. 495 12
Brodek v. Indem. Ins. Co., 292 Ill. App. 363 32
Erie Ry. v. Tompkins, 304 U. S. 64 41
Eudaley v. Ocean, etc., Corp., 77 F. (2d) 785 17
Fidelity etc. Co. v. Gray, 72 P. (2d) 341 .....4, 18, 21
Glennie v. Falls Equipment, 263 N. Y. S. 124 .....13, 15
Grossman v. Ind. Com., 376 Ill. 198 25
Iott v. Cont. Cas. Co., 284 P. 823 12
Kinnan v. Globe, 233 Ill. App. 451 36
Ladoga Can. Co. v. Mut. Liab. Co., 40 N. E. (2d) 995.. 31
McCaleb v. Cont. Cas. Co., 116 S. W. (2d) 679 30
Meredith v. City of Winterhaven, 320 U. S. 228, 237, 64 S. Ct. 7, 12 41
Morris v. Cent. West Co., 351 Ill. 40 .....12, 30, 39
Phillips v. Ind. Com., 390 Ill. 335 .....4, 18
Robertson v. Bd. of Commr's, 252 P. 196 12
Sampson v. U. S. F. & G., 131 Kan. 59, 289 P. 427..... 12
Stevens v. Ind. Com., 346 Ill. 495 25
The Conqueror, 166 U. S. 110, 17 S. Ct. 510 4
The Three Friends, 166 U. S. 1, 17 S. Ct. 495 4
Thompson v. Parke, 198 Atl. 819 30
United States v. Genl. Motors, 323 U. S. 373 4
Utica Mut. Ins. v. Glennie, 230 N. Y. S. 673.....4, 13
Wood v. Employers Corp., 41 F. (2d) 573..4, 18, 20, 30, 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner,*

v.

ROBERT J. SINDELAR, Executor of the Last Will and Testament of Joseph C. Sindelar, Deceased, and CAROLYN L. SINDELAR, *Respondents.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Liberty Mutual Insurance Company, by its Attorneys, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 9, 1947, reversing the decision in said cause of the United States District Court sitting in Chicago, Illinois, and also to review an Order of the United States Circuit Court of Appeals for the Seventh Circuit, entered on June 19, 1947, denying Petition for Rehearing; successive Stays of Man-

date extending to August 23, 1947, having been duly granted by said Court; and files herewith complete transcript of record in said cause, and Brief in support of this Petition.

OPINIONS OF THE COURTS BELOW.

The memorandum opinion of the District Court, Walter J. LaBuy, Judge, sitting, to the effect that the Complaint in said cause does not state a cause of action may be found on pages 34 to 39, inclusive, of the transcript of record filed herewith. This opinion was filed February 12, 1946.

The Order dismissing the Complaint was entered February 25, 1946, and may be found on pages 39 and 40 of the said transcript of record.

The opinion of the Circuit Court of Appeals for the Seventh Circuit reversing the Order of Judge LaBuy and written by Judge Major may be found in the said transcript of record on pages 53 to 63, inclusive. It was entered May 9, 1947.

Order denying Petition for Rehearing by the United States Circuit Court of Appeals for the Seventh Circuit appears on page 66 of the said transcript of record and was filed June 19, 1947.

The first Stay of Mandate appearing on page 67 of the transcript of record was granted June 23, 1947, and extended for 30 days thereafter. The second Stay of Mandate, to August 23, 1947, was issued after the transcript of record had been made up by the Clerk of the United States Circuit Court of Appeals.

STATEMENT OF THE CASE.

The case came before the Circuit Court of Appeals on appeal from the judgment of the Court below dismissing plaintiffs' suit for failure to state a cause of action.

The Complaint alleged that one Joseph C. Sindelar, while president of E. W. A. Rowles Co., was accidentally killed while engaged in the performance of his duties; that a standard workmen's compensation policy had been pur-

chased from the defendant, Liberty Mutual Insurance Company, and was in full force, virtue, and effect and that the premium on said policy included a charge upon the payroll of the said Joseph C. Sindelar. It was admitted by the parties that Mr. Sindelar was not performing the duties of an ordinary workman and that he would have no rights under the Workmen's Compensation Act of Illinois for that reason. But it was claimed by the executor of the deceased and by his widow, who were parties plaintiff, that the policy itself conferred a direct liability in their favor as against the insurance carrier, based upon clause 5 of said policy, paragraph 6 of the workmen's compensation endorsement attached to said policy and other paragraphs, all included by reference in the opinion of the Circuit Court of Appeals set forth in the transcript of record, pages 53 to 62 inclusive.

The Court below had held that the plaintiffs did not have a direct right of action because Sindelar did not come under the provisions of the Workmen's Compensation Act and was therefore not one of those referred to in section 1 (a) of the policy; and that no right of action existed under clause 1 (b) of the policy against the insurance carrier for the reason that no negligence on the part of the employer was alleged, and it was agreed that the employer was not in bankruptcy, so that under section G of the policy no direct action would lie.

But the Circuit Court of Appeals held that various provisions of the policy, especially including clause 5, would give a right of action directly against the insurance carrier on behalf of Mr. Sindelar or his executors or dependents; and that Court reversed the lower Court referring the matter back to that Court for further proceedings. Successive Stays of Mandate were granted up to August 23, 1947.

It is the contention of your petitioner that the policy does not give a direct right of action to the plaintiffs below, that the Circuit Court of Appeals misunderstood the meaning and intent of the language of the policy and should have sustained the Court below dismissing the Complaint, and further that if there is any ambiguity in the meaning of

the words of the policy and the cause should be remanded to the United States District Court, the remanding Order should contain a provision that testimony might be taken in the Court below as to the intent of the parties to the contract.

REASONS FOR ALLOWANCE OF WRIT.

1. Great public interest.

   The policy in this cause is a Standard Workmen's Compensation and Employers' Liability Policy. It is the only policy used in all but 4 or 5 states in the Union. So hundreds of thousands—perhaps millions—of this type policy are in existence. If the opinion of the U. S. Circuit Court of Appeals is to prevail, these policies are subject to this erroneous interpretation.

2. The decision hampers, if it doesn't prevent, a proper defense of the case in the Court below on the merits—because it precludes the carrier from introducing evidence of the intention of the parties to the contract—if the contract *is* ambiguous.

   United States v. *Genl. Motors,* 323 U. S. 373.
   Am. Constr. Co. v. *Railway,* 148 U. S. 372.
   The Three Friends, 166 U. S. 1, 17 S. Ct. 495.
   The Conqueror, 166 U. S. 110, 17 S. Ct. 510.

3. There is a conflict between the courts of Indiana and those of Oklahoma, Illinois, and New York and a conflict between decisions of the U. S. Circuit Court of Appeals, itself.

   Am. Mutual, etc., Co. v. *Duesenberg,* 14 N. E. (2d) 919—Indiana.
   Fidelity, etc., Co. v. *Gray,* 72 P. (2d) 341—Oklahoma.
   Phillips v. *Ind. Com.,* 390 Ill. 335—Illinois.
   Utica Ins. Co. v. *Glennie,* 230 N. Y. S. 673—New York.
   Wood v. *Employers, etc., Corp.,* 41 F. (2d) 573—Circuit Court of Appeals.

4. The refusal of the Writ would work extraordinary inconvenience on all insurance carriers, and embarrassment in the further conduct of the defense in the case at Bar.

Am. Constr. Co. v. *Jacksonville, etc., Ry.*, 13 S. C. Rep. 758; 148 U. S. 372.

WHEREFORE your Petitioner respectfully prays that the Writ of Certiorari issue out of and under the seal of this Court to review the decision, decree and remanding order of the Circuit Court of Appeals for the Seventh Circuit; further prays that said decision, decree and remanding order be reversed and for naught held; and further prays in the alternative that if this Court should feel that the Policy Contract is ambiguous that the cause be remanded to the United States District Court with orders to take testimony as to the intention of the parties to the contract.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

By:
JAMES J. MCKENNA,
HOWARD BOYD,
GEORGE D. HORNING, JR.,
Counsel for Petitioner.

APPENDIX.

Several clauses of the Policy Contract are discussed in the Opinion of the Court Below and form the basis for the arguments of both sides to this controversy. All of these may be found in their proper place in the transcript of record, but it seemed to us that it might be helpful to collect them all in one place as follows:

Standard Workmen's Compensation and Employers' Liability Policy

LIBERTY MUTUAL.

INSURANCE COMPANY

Boston, Massachusetts

(Herein called Company)

Does hereby agree with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows:

(Trans. 3)

One (a).

To pay promptly to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all instalments thereof as they become due,

(1) *To such person because of the obligation for compensation for any such injury imposed upon or accepted by this Employer under such of certain statutes, as may be applicable thereto, cited and described in an endorsement attached to this Policy, each of which statutes is herein referred to as the* ***Workmen's Compensation law, and***

(2) *For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, what-*

ever funeral expenses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this Policy, while this Policy shall remain in force. Nothing herein contained shall operate to so extend this Policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached.

(Trans. 3)

One (b).

To indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada. In the event of the bankruptcy or insolvency of this Employer the Company shall not be relieved from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency, an execution against this Employer is returned, unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person claiming by, through or under the injured, against the Company under the terms of this Policy for the amount of the judgment in said action not exceeding the amount of this Policy.

(Trans. 3)

Five.

This agreement shall apply to such injuries sustained by any person or persons employed by this Employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this Policy is to be

computed and adjusted, and, also to such injuries so sustained by the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation. The remuneration of any such designated officer shall not be subjected to a premium charge unless he is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman.

(Trans. 4)

Paragraph Six of Workmen's Compensation Endorsement.

6. If this Employer is a corporation, the entire remuneration of the President, any Vice-President, Secretary, Treasurer and other executive officers elected or appointed in accordance with the charter and by-laws of such corporation shall be disclosed and premium shall be paid thereon, subject to a minimum individual remuneration of $30 per week, if the actual remuneration is less than such amount, and to a maximum individual remuneration of $100 per week, if the actual remuneration is greater than such amount. The remuneration so determined of each executive shall be assigned without division to the classification which is applicable to the actual operations in which such executive officer is primarily engaged, provided the remuneration so determined of each executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman or workman, or whose duties include direct charge of the actual performance of any operations of this Employer, shall be assigned without division to the highest rated classification which is applicable to any such duties undertaken by such executive officer for any part of his time.

(Trans. 18)

D.

Statutory Obligations. The obligations of *Paragraph One* (*a*) foregoing are hereby declared to be the direct obligations and promises of the Company to any injured employee covered hereby, or, in the event of his death, to his dependents; and to each such employee or such dependent the Company is hereby made directly and primarily liable under said obligations and promises. This contract

is made for the benefit of such employees or such dependents and is enforceable against the Company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the Company alone or jointly with this Employer. If the law of any state in which the Policy is applicable provides for the enforcement of the rights of such employees or such dependents by any Commission, Board or other state agency for the benefit of such employees or such dependents, then the provisions of such law are made a part hereof, as respects any matters subject thereto, as fully as if written herein. The obligations and promises of the Company as set forth in this paragraph shall not be affected by the failure of this Employer to do or refrain from doing any act required by the Policy; nor by any default of this Employer after the accident in the payment of premiums or in the giving of any notice required by the Policy or otherwise; nor by the death, insolvency, bankruptcy, legal incapacity or inability of this Employer, nor by any proceeding against him as a result of which the conduct of this Employer's business may be and continue to be in charge of an executor, administrator, receiver, trustee, assignee, or other person.

(Trans. 7)

G.

Action Against the Company. No action shall lie against the Company to recover upon any claim or for any loss under *Paragraph One* (*b*) foregoing unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this Employer after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years thereafter.

(Trans. 8)

IN THE

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v.

ROBERT J. SINDELAR, Executor of the Last Will and Testament of Joseph C. Sindelar, Deceased, and CAROLYN L. SINDELAR, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In reversing the order of the U. S. District Court.

(2) In holding that the policy contract gives a direct right of action against the insurance carrier to officials not acting as ordinary workmen.

(3) In remanding the cause to the District Court without directing that evidence of the intention of the parties might be introduced.

(4) In its analysis of the meaning of clause five of the policy.

(5) In failing to sustain the District Court's dismissal of the action.

(6) In holding that payment by his employer of a premium on Sindelar's salary gave Sindelar a direct right against the insurance carrier.

ARGUMENT.

A.

Analysis of the Duesenberg Cases.

American Mutual Liability Insurance Co. v. *Duesenberg,* 14 N. E. (2d) 919.
American Mutual Liability Insurance Co. v. *Duesenberg,* 16 N. E. (2d) 698. (Rehearing)

The Duesenberg cases were decided under a misconception of the meaning of Clause FIVE of the Standard Policy and also of the opinions of the Courts in the six cases cited in the Duesenberg cases. We shall analyze these briefly.

Bituminous Casualty Corporation v. *Powell,* 194 N. E. 495. In this case the injured man was doing the work of an employee and there was an additional endorsement on the policy extending coverage to the very job that he was performing. Clause FIVE was not mentioned in the opinion.

Morris v. *Central West Casualty Co.,* 351 Ill. 40. The same conditions prevailed in this case. Morris was doing the work of an employee when injured. There was an additional endorsement to the policy covering the thing he was doing and Clause FIVE was not mentioned or referred to directly or indirectly in the opinion.

Next come three Kansas cases:

Robertson v. *Board of County Commissioners,* (1927) 122 Kan. 486, 252 Pac. 196.
Iott v. *Cont. Cas. Co.* (1930) 129 Kan. 650, 284 P. 823.
Sampson v. *U. S. F. & G.* (1930) 131 Kan. 59, 289, P. 427.

In the first two of these there was an additional endorsement covering the particular work being done by the injured man and Clause FIVE was not referred to directly

or indirectly in the opinion. In the third case the insurance carrier had stopped compensation, and the only question at issue was whether the employee was still disabled. Clause FIVE was not mentioned or referred to directly or indirectly in the opinion.

The point that we are emphasizing all through this Brief is that an injured man has no rights under Clause ONE (a) of the Policy Contract, unless he comes under the Workmens' Compensation Act of the State, *or* there is an *additional endorsement* in the Policy Contract directly conferring upon him or his class the benefits of the Act; and in all five of the cases above discussed liability depends upon an additional endorsement, and in the case at bar there is no additional endorsement giving Sindelar any additional rights or any rights at all under Clause ONE (a).

The last case cited by the Court presents the strangest misconception of all. It concerns *Utica Mut. Ins. Co.* v. *Glennie*, 230 N. Y. S. 673. As to that case, the Court in the first Duesenberg Case says:

> "The case last cited was one where the president of a corporation asserted a claim for personal injuries against an insurance company under a policy which contained a clause precisely identical with paragraph five quoted above." (Opinion page 924).

The above quotation from the opinion shows a misconception of the whole theory of the Utica Mutual case.

President Glennie did *not* bring suit against the insurance carrier at all. He brought suit against his own employer and was awarded damages by a jury, but the cause was reversed by the New York Court, as indicated infra, in *Glennie* v. *Falls Equipment Co.*, 263 N. Y. S. 124.

This error was admitted by the Court in the rehearing of the same cause, 16 N. E. (2d) 698, when the Court at the very beginning of its Opinion points out that counsel has called the error to its attention, and the Court thereupon admits:

> "Appellant's statement of the factual background of the Glennie case is correct, but in the consideration of precedents Courts do not look so much for identity of facts as for statements of applicable principles."

The Court then goes on to state that the Glennie case is helpful to its Opinion because Clause FIVE "extended the contract of insurance to include executive officers." With this we have no quarrel. The very *intent* of Clause FIVE was to tell who came under the policy and that included executive officers. But Clause FIVE does not say that executive officers come under section ONE (a) or section ONE (b) exclusively, because such executives come under the one or the other of these two Clauses, depending not upon the wording of the policy but the Workmen's Compensation Act of Illinois, and other Statutory provisions and the opinions of its Courts.

It seems that Glennie, the president of the employer, was hurt while riding in a car driven by a chauffeur of the employer. He brought an action against the employer and one Willard S. Martin, who was the driver. Glennie had already applied to the Workmen's Compensation Commission but his claim was disallowed on the ground that he was not an employee. When Glennie brought the common law action for personal injuries against his employer a dispute arose between the employer and the insurance carrier as to whether or not the insurance carrier would have to defend that suit, and the employer argued that Subdivision Five—which is exactly like Clause FIVE in the policy in the case at bar—was made for just such cases. The carrier disagreed because Glennie had been held by the Courts *not* to be an employee—and brought the action for declaratory judgment. The Court felt that it *was* the duty of the insurance carrier to defend the suit, and the Court says that Clause FIVE extends the *scope* of the Policy to *include* officials.

So! Clause FIVE merely *enlarges the number or kind of people* who come under the provisions of the policy; in

other words, the *employer* is responsible to Glennie just as to any regular employee under the policy contract—but, of course, this responsibility is not in the *Glennie* case under the Workmen's Compensation Act represented by Clause ONE (a) of the policy but is, as the opinion shows, a right under Clause ONE (b) as quoted on page 674 of the opinion, where the plaintiff acted as a president and not as an employee.

It will be noted that the Court does not say that Glennie has a right of action *against the insurance carrier* but merely that the insurance carrier must *defend the employer against Glennie.* And that, of course, all matters of defense are available to the employer when he is defended by the carrier as though the employer was himself defending.

This is peculiarly shown by the very case which had been brought by President Glennie. *Glennie* v. *Falls Equipment Co.*, 263 N. Y. S. 124, was an appeal from the first action brought by Glennie against his employer and the servant Martin. A jury had awarded him a verdict of $25,000, but the Supreme Court reversed the lower court on the ground that if the work being done at the time of the accident was part of the business of the employer, then Glennie and the driver Martin were fellow servants and the employer *was not responsible* to Glennie for the negligence of a fellow servant. On the other hand, if whatever they were doing was not connected with the business of the employer, then Martin was not the servant of the employer and so the *employer was not responsible.*

This case, we think, shows the situation very clearly. President Glennie had an action *against his employer* if he could establish some duty breached by the employer and could at the same time avoid the natural defenses inherent in the relationship of master and servant. And if he could not establish a case *against the employer,* then, of course, he could not establish a case *against the insurance carrier,* for the insurance carrier was merely responsible to pay

any judgment that might be secured *against the employer.*

The duty to defend as set forth in both these last two cases is not a right running *to* the employee, but *against* him. It is the employer *alone* who may claim that right against the insurance carrier. There is nothing in either of these two cases to indicate that the president, Glennie, had any right against the insurance carrier at all.

It is important to understand exactly what the New York Court held in the *Glennie case*—and all the more so since the Court in the *Duesenberg case* misunderstood the *Glennie* cases entirely.

The *Utica* case construed Clause FIVE—as *adding* executives to those people to whom the Employer owed the protection described in Clauses ONE (a) and ONE (b)—and construed Clause THREE—as compelling the insurance carrier to defend the *Employer* against claims filed under either of those clauses.

Clause ONE (a) gave a direct right against the carrier—if the claimant could qualify as doing the work of an employee—under the Workmen's Compensation Act.

But Clause ONE (b) did not give any right against the carrier to the claimant. And Glennie came under Clause ONE (b)—as does President Sindelar in our case.

So Clause FIVE gave Glennie no right against the carrier—and gives Sindelar or his heirs, executors, or dependents no right against *this* Insurance Carrier.

So in the case at Bar Section FIVE *includes* Mr. Sindelar as being one whose injuries are covered by the agreement *between the carrier and the employer,* but that does not mean that Sindelar acquired any direct right against the *carrier.* It merely means that the *employer* secured from the carrier protection to itself, *against* claims by Sindelar.

In the *Glennie* case it turned out that the president, Glennie, did not have a good cause of action against his *employer.* That is also true as to President Sindelar as admitted by Appellants.

B.

Premium on Sindelar's Salary.

In passing, we note that the complaint alleges that the employer paid premiums computed upon the president's salary as well as upon the salaries of other employees.

This, of course, does not in any way entitle the president to any greater rights or favors than any other employees may receive. Nor does it entitle him to any greater coverage than they, nor to any coverage greater than whatever the employer owed him under Clauses ONE (a) and ONE (b). This question is considered in *Eudaley* v. *Ocean Accident & Guarantee Corporation*, 77 F. (2d) 785. That was a case in which the employee was doing something not in the usual course of the business of the employer at the time of the accident, and under the Texas law this was not covered by the Workmen's Compensation Act. The argument was made by the employee that because the insurance carrier took a *premium on his wages* that it was estopped to deny him coverage. On page 786, the Court said:

> "An estoppel to deny that the deceased was insured is sought to be builded on the fact that his wages were reported to the appellee insurer and included in the basis for fixing the premium charge, and there has been no return of the resulting increase in premium since the insurer had knowledge of the facts. It is held that such considerations cannot impose liability to pay compensation under the statute in a case not covered by it. *Southern Surety Co.* v. *Inabnit*, 119 Tex. 67, 24 S. W. (2d) 375; *Hill* v. *Georgia Casualty Co.* (Tex. Com. App.) 45 S. W. (2d) 566. But no basis for such a contention exists here, because the policy is a double one, and not only insures employees for their compensation under the Compensation Law, but also *indemnifies the employer against other liabilities for injury* to employees, so that a premium may justly have been demandable on account of the deceased and others like him who were not under the Compensation Law, but might have had claims on account of their employer's negligence. No such claim is here set up." (Italics ours.)

In *Wood v. Employers' Liability Assur. Corp.*, 41 F. (2d) 573, the same question is considered by the District Court of the United States for the Seventh District, and on page 84, we find:

> "The fact that employer included decedent's name in the pay roll estimate does not prove that employer intended to insure him against all hazards. As stated in the briefs and argument, decedent was likely to be engaged in agriculture or other work. If in agriculture, he would not be protected by the Indiana Workmen's Compensation Law, but by employers' common-law and other statutory liability; if in other work, he would be protected by Indiana Workmen's Compensation Law. *The policy covered both, and it was therefore quite necessary that decedent's name be included in the pay roll estimate.*" (Italics ours.)

To the same effect is *Fidelity & Casualty Co. of New York* v. *Gray*, 72 P. (2d) 341. In other words, as shown by these three cases, the premium charge on the pay roll remuneration of any pay roll employees—paid by the *employer* and not by Mr. Sindelar—is a sufficient consideration for whatever agreement was made by the employer and the defendant insurance carrier, but it is said in the *Wood* case *supra* on page 84:

> "To have insured decedent against the injury received would have been a gratuity on employer's part, for the statute did not require it."

In *Phillips* v. *Ind. Com.*, 390 Ill. 335, Phillips owned a printing shop and Goveia worked for him there. His salary was paid by the printing business and was included in the pay roll premiums collected by the insurance carrier.

Goveia was hurt while cutting down a tree at the home of Mr. Phillips. Phillips was not under the Act as to his home because that was not a business so when Goveia was cutting down the tree he was not protected by the Workmen's Compensation Act.

Even though the wages drawn by Goveia while working at Mr. Phillips' home were paid by the printing business and the insurance carrier collected a premium on them, Goveia still had no right of action under the Workmen's Compensation Act and could not collect under the Workmen's Compensation policy covering Mr. Phillips' printing business.

In short, the mere fact that an insurance carrier collects a premium income on the wages of an injured man does not allow him to collect under ONE (a) for an injury if he is not under the Workmen's Compensation Act at the time of such injury, and no special endorsement is added to the policy contract.

C.

Analysis of Clause Five.

We have printed below Clause FIVE, separated in *three* Sections for help in analysis of its meaning.

This agreement shall apply

to such injuries sustained by any person or persons employed by this Employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this Policy is to be computed and adjusted,

and, also to such injuries so sustained by the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation. The remuneration of any such designated officer shall not be subjected to a premium charge unless he is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman.

That is to say—all persons to whom "this agreement shall apply" are divided into TWO GROUPS.

Group I embraces *everyone* upon whose *entire* wages the Company collects a *Premium*. The criterion in this group

is "Do we get a premium on *all* their wages?" If so, the "agreement applies" to their INJURIES. It is not an agreement *with* those persons. It is *still* an agreement between the Company and the Employer to keep the promises set forth in the *whole agreement*.

This group does not consist of ordinary employees *alone*. It might include officials if their *entire* payroll is included in the Premium base. Or it might include blind men, or farmers, or maid servants, or independent contractors. It does not use the word "employees" at all. It is sufficient for this group if the injured person is "employed" by the Employer and his *entire* wages are counted in the Premium adjustment.

Nor do we find that this group *necessarily* comes under Clause ONE (a) or that its members are to be paid under the Compensation Act, or get any special consideration or unusual privileges. In other words, they are people concerning whose INJURIES the Company has to take the place of the Employer if they come under the ACT or has to *protect* the Employer against them if not.

Group II embraces Officials—whether any of, or all of, their wages form the basis of a premium charge.

Nowhere is it provided that this group has a direct agreement with the Company. Nowhere does it say that members of this group may collect under the Compensation Act or under Clause ONE (a) of the policy.

The plain meaning of the language used is that the *agreement* "also" applies to injuries of Officials—not some parts of the agreement alone—but the *whole agreement* and that agreement is that the Company pays them if they come under the ACT and protects *against* them if not. *Wood* v. *Employer*, 41 F. (2d) 573.

The language of Group II merely relaxes somewhat the *premium requirements* of Group I. But it does not give any privileges or extra rights to any member of the group apart from the privileges or rights conferred upon the members of Group I.

Clause FIVE does not *pay anything to anybody*. It does not confer *benefits* or *privileges* on anyone. It merely provides that members of Group II are the same with regard to the policy agreement as members of Group I despite the fact that the premium requirements *expected of the Employer* are somewhat relaxed with relation to the amount paid by the Employer with relation to Group II.

It is to be observed that no persons forming part of either group pay anything whatever to the Company. The Company collects from the Employer *alone*; but on a different basis with regard to the payrolls of the members of the two groups.

But this discrimination in favor of the *Employer* does not add to or subtract from the rights of the members of the two groups. They are all the same. They *all* come under the *agreement* and what they get *if anything* is determined by the Compensation Act and the Common Law. The policy itself does not determine what any injured man gets. It just promises the *Employer* to take his place for those to whom the ACT applies and to *protect* him against the demands of those who sue at Common Law.

D.

The Language of the Standard Policy is Plain and Unambiguous.

Part of the reason for the attack upon the Standard Policy is that its language is alleged to be ambiguous.

This charge of ambiguity was discussed in *Fidelity and Casualty Co.* v. *Gray*, 72 P. (2d) 341.

In that case an employee suffered a partial loss of hearing due to the conditions of his employment and he was refused workmen's compensation on the ground that this loss was not an accident, but was the result of a gradual process. Mr. Gray brought suit against the insurance carrier on the theory that the policy assumed a direct responsibility to the plaintiff, and so he should recover independent of any right to recover under the Act, but in the manner provided by section ONE (a).

The Court admitted that an insurance company by a special endorsement *could* assume a liability of that kind, but pointed out that there was nothing in the policy or any endorsement thereto which *did in fact* assume such liability. As to the charge of ambiguity the Court said, beginning on page 344:

> "(5) Insurance policies, when uncertain in meaning, are construed strongly against the company on the theory that the company which prepares the policy is responsible for the uncertainty. U. S. Fidelity & Guaranty Co. v. Town of Comanche et al., 114 Okl. 237, 246 P. 238; Lincoln Health & Accident Ins. Co. v. Johnigan, 114 Okl. 223, 245 P. 837; Metropolitan Life Ins. Co. v. Lillard et al., 118 Okl. 196, 248 P. 841. However, the policy now before us *is not sufficiently uncertain* in the respect which plaintiff urges to justify his recovery upon the application of that rule of construction alone. It is proper to note at this point that rules of construction are designed as an aid in determining the true intent of the parties. They are guides, not mandates of the law. As said by Elliott in his work on contracts, par. 1507, page 778: 'It must be constantly borne in mind, however, that the rules of construction are not strict rules of law. They are but aids in ascertaining the intention of the parties.' "

And again at pages 729, 730 of the same work, it is said:

> "The purpose of all rules for the construction of contracts is to aid in ascertaining the intention of the parties from a construction of the whole agreement. Thus, in the construction of an insurance policy it is the duty of the court to adopt that construction of the policy which in its judgment will best correspond with the intention of the parties. To ascertain the intention, regard must be had to the nature of the instrument itself, the circumstances under which it was executed and the object which the parties had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have."

One learned judge, in commenting for a federal court upon the application of rules of construction,

observed: "We must recognize, not only that there is a critical breaking point, as it were, beyond which no language can be forced, but that in approaching that limit the strain increases." Eustis Mining Co. v. Beer, Sondheimer & Co., Inc. (D.C.) 239 F. 976, at page 982. To this we may add that as we approach the limit, the reason must increase in proportion to the strain.

(6) The policy was issued to an employer who employed workmen falling within the Workmen's Compensation Law to whom he might become liable under and by virtue of that law and to whom he might become liable in tort or for negligence. *No surrounding or accompanying circumstance is shown to indicate that the employer desires to procure or pay for a broader "coverage" than would be essential for his own protection.* It was stipulated at the trial that the premium paid for the insurance was "commensurate with the rate for such insurance," which means nothing more than that the employer paid full value for the protection afforded by the policy, whatever that protection may have been. But treating the stipulation as an agreement that the premium paid was commensurate with an assumption of liability to pay compensation in accordance with the Workmen's Compensation Act, it adds nothing to plaintiff's case, since the insurance company admittedly assumed that liability under the policy, and the nonaccidental character of the plaintiff's injury removed him from the provisions of the act. Plaintiff is seeking to impose a liability in addition to that which was, according to the stipulation, contemplated by the premiums paid. We are unable to find in the policy now before us or in the circumstances which surrounded or attended its execution any justification for the judgment rendered by the trial court. In fact, our consideration of the contract and the circumstances shown in connection with its execution impels a different conclusion." (Italics ours.)

The reason why the injured man was not entitled to the provisions of the Workmen's Compensation Act is not important. It may be because he is a blind man or because his accident didn't arise out of his employment, or because

he is a casual employee who is not entitled to protection of the Act or because he is an official who is not doing the work of an ordinary employee. In any event, the policy is intended to go only as far as the wishes of the employer and the extent of coverage he wants to buy. So for whatever reason an injured man is not covered by the Compensation Act he is not covered by ONE (a) of the policy unless there is an additional endorsement to that effect. But his employer is protected against him as to any claim that he may make outside of the Act; and if he is outside of the Act he has no direct right against the insurance carrier and the policy provisions are unambiguous to that effect.

E.

Analysis of Opinion of Court Below.

Point 1.

The Circuit Court of Appeals, in deciding that paragraph five extended the contract to give Sindelar benefits under paragraph one (a) on a purely voluntary basis, equivalent to those that ordinary workmen are entitled to under the Compensation Act, overlooked the express intention of the parties to the exact contrary found in the concluding sentence of paragraph one (a) itself.

The concluding sentence of Paragraph ONE (a) reads as follows:

> "Nothing herein contained shall operate to so extend this Policy as to include within its terms *any* Workmen's Compensation Law, *scheme* or *plan* not cited in an endorsement hereto attached." (Italics ours.)

It must be conceded that by its decision in this case, that Court extended this policy so as to provide a *scheme* or *plan* of compensation benefits to Mr. Sindelar neither expressly included within Paragraph ONE (a) nor set forth in any endorsement of the policy.

The Court itself, in its opinion, (Trans. 56) admits that the question is whether any other paragraph of the policy "enlarged or extended" Paragraph ONE (a). Thus, in upholding this complaint, the Court has done so in the teeth of plain language of the policy to the contrary.

Point 2.

The Circuit Court of Appeals misunderstood the Insurance Company's contention when it stated at page 6 of its opinion:

> **"Thus, defendant concedes that it collected a premium upon all the salaries of the insured's officials including that earned in an executive capacity, as provided by paragraph five and the endorsement, concedes that they are thereby made subject to the policy and are included in the contract, but argues that they are not entitled to any benefits under the policy because they are not employees either under paragraph one (a) or One (b)." (Trans. 58)**

Petitioner does *not* contend that officers of the corporation "are not entitled to any benefits under the policy because they are not employees either under Paragraph *ONE* (*a*) or *ONE* (*b*)."

Petitioner's position is simply this:

(1) Officers of a corporation are entitled to benefits under *ONE* (*a*) of the policy if they suffer an injury compensable under the Illinois Workmen's Compensation Law, and they come under that law when they are injured while engaged in duties ordinarily performed by a workman and not in those duties pertaining to their official capacity. (*Stevens* v. *Ind. Commission*, 346 Ill. 495, *Grossman* v. *Ind. Commission*, 376 Ill. 198)

(2) a.) Neither officers nor employees of a corporation are (strictly speaking) entitled to *"benefits"* under *ONE* (*b*) because under this clause the insurance company merely agrees:

> "To indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed. • • • "

b.) But under *ONE* (*b*) if an officer or employee obtains a judgment against the employer for damages on account of injuries arising from the operations of the employer covered by the policy, and the judgment is not satisfied by the employer, he may proceed directly against the insurance company under the policy to recover the unsatisfied judgment.

We believe that this misunderstanding of petitioner's position has led the Circuit Court of Appeals to go beyond the plain language of the policy and to look for language therein which might be construed to provide "benefits" (in the sense of direct payments from the insurance company) to corporate officers.

We submit that in doing so that Court has entirely overlooked the fundamental purpose of the policy. The policy was purchased by a corporate employer, E. W. A. Rowles Company, not by Mr. Sindelar or any other officer or employee of the corporation in his individual capacity, to accomplish two things:

(1) To meet its statutory duty to insure workmen's compensation benefits under the Illinois Workmen's Compensation Law. This is done by Paragraph ONE (a) of the policy.

(2) To provide protection or indemnity to *itself* for its common law or statutory liability (outside of the Workmen's Compensation Act of Illinois) against damages sought by its officers or employees.

If these basic purposes of the policy are kept in mind, the structure of the policy and the terms used therein, is clear, and no necessity exists to resort to a strained interpretation of isolated words and clauses to make the policy

a voluntary undertaking to provide "benefits" similar to but outside of, the Illinois Workmen's Compensation Law.

We think that if the Circuit Court of Appeals correctly understood our position at the outset, it would not have had the difficulty in comprehending our interpretation of Paragraph FIVE, that the Court indicated at page 5 (Trans. 57) of its opinion, and it would not have arrived at this distorted construction of a policy, which policy according to *Amalgamated Roofing Co.* v. *Travelers Ins. Co.*, 300 Ill. 487, has been used in Illinois for over thirty years without a single lawsuit appearing in the reports of that state based upon contentions such as the plaintiff makes here, and in spite of the existence of the *Duesenberg* Case (14 N. E. (2) 919) in Indiana for the past ten years.

Point 3.

The Circuit Court of Appeals misunderstood our arguments in stating at page 6 (Trans. 58) of its opinion that:

> **"Under defendant's interpretation, paragraph five serves no purpose. It is meaningless."**

Paragraph FIVE is *not* meaningless under our explanation. We have already made clear in Point 2 our position with respect to Paragraphs ONE (a) and ONE (b), which position we believe the Court misapprehended. We submit that the Court has naturally carried this misapprehension along in discussing our position with reference to Paragraph FIVE.

Our explanation of Paragraph FIVE is this:

(1) Paragraph ONE (b) provides indemnity to the employer on account of injuries "to such of said employees as are legally employed * * * ."

(2) Standing alone, this language leaves room for argument as to whether the word "employees" includes corporate officers. The insurance companies foresaw this problem because this question had arisen in other fields of law (c. f. 29 Words & Phrases 313). Its foresight was later demonstrated by the restricted

meaning placed on the word "employees" by the Illinois Supreme Court in the *Stevens* and *Grossman* cases, *supra*. To eliminate any doubt on this score the insurer inserted in Paragraph FIVE the unqualified statement that:

> "This agreement shall apply * * * to such injuries so sustained by the President, any Vice President, Secretary or Treasurer of this Employer, if a corporation."

(3) Thus, Paragraph FIVE, if it does nothing else, at least it makes clear that if an officer is injured while working in his official capacity and recovers a judgment against his employer at common law, the policy provides protection to the employer and guarantees to such officer the collection of his judgment.

(4) Furthermore, the purpose of the quoted language appearing in Paragraph FIVE is indicated in *Amalgamated Roofing Co.* v. *Travelers Ins. Co.*, 300 Ill. 487, which sets forth parts of the 1916 Workmen's Compensation and Employers Liability Policy. The opinion shows that each of the clauses carried at the left of the first line a title in italics describing briefly the contents of the paragraph. Paragraph FIVE was preceded by the descriptive words "Persons Covered".

The fact that the Circuit Court of Appeals overlooked the possible limitations on the scope of the word "employees" in Paragraph ONE (b) is clearly demonstrated by the Court's statement at page 6 of its opinion (Trans. 58) that even in the absence of Paragraph FIVE, Paragraph ONE (b) of the policy would provide indemnity to the employer against damages demanded by officers in suits for negligence. (This statement will be discussed in the next point.)

We submit that having misapprehended the real meaning of Paragraph FIVE, the Court naturally looked for some other meaning and attributed to Paragraph FIVE the idea of extending the policy to a voluntary plan of providing compensation to corporate officers not entitled

to Workmen's Compensation benefits under the Illinois Act.

Point 4.

The Circuit Court of Appeals misapprehended the scope of the coverage provided for in paragraph one (b) when it stated on pages 5 and 6 of its opinion that officers of the corporation would be covered under one (b) of the policy even in the absence of paragraph five. (Trans. 57, 58)

This statement of the Court appearing in the last paragraph on page 6 of the opinion (Trans. 58) is, we believe, erroneous. We have already indicated that officers of a corporation might not be included within the term "employees" under *ONE* (*b*) of the policy. This is because the word "employees" does not necessarily include corporate officers. Were it not for the provisions of Paragraph FIVE a corporate officer injured while engaged in his official capacity would not be an "employee" within the meaning of that word in Paragraph *ONE* (*b*) as the *Stevens* and *Grossman* cases later demonstrated.

We believe that the Court's misconception of the scope of Paragraph *ONE* (*b*) considered *apart* from the crucial language of Paragraph FIVE that

> "This agreement shall apply * * *to such injuries so sustained by the President, any Vice President, Secretary or Treasurer of this Employer, if a corporation"

naturally led the Court to look for some *other* purpose and meaning for this language of Paragraph FIVE.

We can conceive of no valid answer to our argument just above stated. If the Supreme Court agrees with the force of this argument, we think that it will agree that the Circuit Court's approach to this problem was based on several erroneous premises and that its conclusion therefore did not logically follow. We also think that the several subsidiary arguments used to bolster the Court's conclusion, which we will briefly discuss in the next point, have no

weight when Paragraphs *ONE* (*b*) and *FIVE* are considered in their proper light.

Point 5.

In the light of petitioner's explanation of its position the several subsidiary arguments, discussed on page 7 of the Circuit Court of Appeals' opinion, used to support that court's reasoning, are of no weight.

Under this point we propose to discuss what we contend are misapprehensions and oversights of the Court indicated in its opinion.

FIRST

In the first sentence on Page 7 of its opinion that Court said:

> "It is also pertinent to note that the policy contains no express limitation of liability such as the defendant now seeks to invoke." (Trans. 59)

In POINT 1 we have already discussed the very language of Paragraph ONE (a) which expressly puts a limitation upon any attempt to broaden that paragraph beyond the liability imposed upon the employer under the Illinois Workmen's Compensation Act unless the additional or extended *scheme* or *plan* of liability is included in an *endorsement* attached to the policy.

The fact that a separate endorsement is a familiar device to extend the policy so as to include a voluntary compensation plan is also indicated by the use of similar endorsements in reported cases such as the *Wood* (41 F. 2d. 573), *Morris* (351 Ill. 40), *McCaleb* (116 S. W. 2d 679) and *Thompson* (198 Atl. 819) cases.

Although we did not heretofore *emphasize* this point we think that if it had been emphasized the Circuit Court of Appeals would not have made the statement that the policy contained no express limitation repugnant to the liability which that Court has placed upon the defendant.

SECOND

The Circuit Court of Appeals also stated on Page 7 of its opinion as follows:

> "Paragraph ONE (a) makes the provisions of the Workmen's Compensation Act a part of the contract 'so far as they apply to compensation or other benefits for any personal injury or death covered by this Policy.' Thus the injuries referred to are not limited to those covered by the Illinois Act but include those covered by the policy. This is some indication that injuries other than those covered by the Act were, or at least might be, included in the policy." (Trans. 59)

How the Court places this construction on the above clauses is difficult for us to understand because we think that an analysis of the policy demonstrates that the words "covered by this policy" have just the opposite effect.

The sentence in which these words appear means that the Illinois Compensation Act is part of the policy so far as that Act applies to any "personal injury or death covered by the policy."

The Circuit Court of Appeals has assumed that any injury for which compensation is allowed under the Illinois Act is an injury covered by the policy. This is not necessarily true because there are limitations in the policy which prevent it from being co-extensive with the liability of the employer under the Compensation Act.

For example, we call attention to two cases in which the standard policy in Illinois was discussed with relation to the Illinois Compensation Act; and, in each of these cases, it was decided that the policy was *not as broad* as the Illinois Act.

In *Ladoga Canning Company* v. *Employers Insurance Company,* 40 N. E. 2d 995, a minor employee was illegally employed around some machinery, and was injured. He chose to bring suit at common law, as he was permitted to do under the Illinois Compensation Act—§ 6.

The Court held that the employer was liable, but that the carrier was *not* liable under the policy, because coverage of employees under ONE (b) was restricted to "employees as are *legally* employed." (Italics ours.) The reason that an *Indiana* court passed upon this question is because the employer's principal office was in Indiana, although the factory in which the injury occurred was in Illinois.

In *Brodek* v. *Indemnity Insurance Company,* 292 Ill. App. 363, 11 N. E. 2d 228, the Illinois Appellate Court held flatly that the policy is *not as broad* as the Act.

In that case, the Court discussed the right of an employee to recover against his employer under sections 2 and 15 (b) of the old O.D. Act, under which sections the Commission took jurisdiction and awarded compensation, just "as though the disease was an accident," Cahill, Ill. Rev. Stat., chap. 48, paragraphs 186 and 199 (b).

The Court held, at page 376, that the employer was liable under the law for compensation, but the carrier was *not* because the policy was not co-extensive with the law, but was confined to coverage of *actual* accidents.

So, the policy is not broader than the Act. The Act is *broader than the policy.*

Keeping in mind these two decisions that the policy is not as broad as the Act, consider the restrictions in the following paragraphs, to demonstrate that the policy is *not* intended to cover *anything* that can happen to *anyone* at all.

Paragraph FIVE restricts the coverage of the policy to "* * * persons whose entire remuneration for which provision is hereinafter made, upon which remuneration the premium for this Policy is to be computed and adjusted and * * * the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation." (Trans. 4)

Paragraph SIX restricts the coverage of the policy to "injuries so sustained by reason of the business operations described in said Declarations which * * * include all operations necessary, incident or appurtenant thereto * * * conducted at the work places defined and described in the

declarations or elsewhere in connection with or in relation to such work places." (Trans. 5)

Paragraph SEVEN restricts the coverage of the policy "* * * only to such injuries so sustained by reason of accidents occurring during the Policy Period. * * *" (Trans. 5)

We submit that in the face of the *Ladoga* and *Brodek* cases, *supra*, page 11, and of the above exposition of the purpose of the words "covered by this policy" there appears to be no justification for the Court's statement that the words in question "might" mean that injuries other than those covered by the Act are included in the policy.

THIRD

Again, in Page 7 of its opinion, (Trans. 59) the Court states that the use of the word "hereby" in Paragraph D (Trans. 7) indicates a recognition of direct obligations other than those of Paragraph ONE (a) because otherwise the word "thereby" should have been used.

Please remember that "the obligations of Paragraph ONE (a)" are definitely *restricted* by the last sentence thereof to exclude "any *scheme* or *plan*" unless "cited in an endorsement hereto attached." And there is no such endorsement.—See discussion in Point 1, hereof.

We submit that the Circuit Court of Appeals did not appreciate the effect of its own argument on this point. If the word "thereby" was used, the clause would read "injured employees covered thereby," the word "thereby" referring to the provisions of Paragraph ONE (a).

We have just pointed out that the Court should not consider Paragraph ONE (a) standing alone but must look to other limiting provisions of the policy, particularly those in Paragraphs FIVE, SIX and SEVEN, to find the persons covered by Paragraph ONE (a). Obviously the use of the word "thereby" in Paragraph D would limit its application to Paragraph ONE (a), whereas, to find out who are covered by the policy other paragraphs of the policy must necessarily be considered.

Looked at in this light it becomes readily apparent that the word "hereby" was properly used in Paragraph D in its broad sense as referring to the entire policy contract, and limitations found therein.

FOURTH

At the end of Page 7 of its opinion the Circuit Court of Appeals refers to Paragraph 2 of the Workmen's Compensation Endorsement, and, after quoting it, states:

> "Thus, it appears that two kinds of insurance are referred to, (1) that under the Act (meaning the Workmen's Compensation Act) and (2) that described by the language which we have italicized." (Trans. 59)

Two types of insurance are not, it is respectfully submitted, referred to in this clause. The words *italicized* in the opinion, "*and to personal injury by accident in operations which are necessary, incident or appurtenant to or connected with the business operations subject to this Act,*" are merely a recognition of the extension of the policy by Paragraph SIX to include, in addition to the operations specifically mentioned in the Declarations, those incidental or appurtenant thereto and which might be incidental or appurtenant to a business operation covered under the Compensation Act.

* * * * *

We submit that we have now demonstrated that the four subsidiary arguments, used by the Court to lend support to its conclusion, fall of their own weight when viewed in the light of the explanations set forth in this point. Furthermore, when Paragraphs ONE (a), ONE (b) and FIVE are read as we have explained them, there is no need to struggle with a few isolated words and clauses to try to give them a strained meaning for the purpose of propping up an extension of Paragraph ONE (a) of the policy by means of Paragraph FIVE, especially when such an extension is entirely inconsistent with the concluding sentence of Paragraph ONE (a). (Please refer to POINT 1, *supra.*)

Point 6.

The Circuit Court of Appeals has misapprehended the references to the premium charges in connection with the remuneration paid to officers of the employer.

In approaching its construction of Paragraph FIVE, the Court makes the following observation in its opinion at page 4: (Trans. 56)

> "The last sentence of this paragraph indicates that it was the purpose to collect premiums only upon that part of a corporate officer's salary earned while performing the duties of a workman. In other words, that sentence is consistent with defendant's contention that a corporate officer was to be insured under ONE (a) only when he was performing services within the Illinois Act. However, this sentence is completely nullified by Paragraph SIX of the endorsement which provides:
>
> > 'If this Employer is a corporation, the entire remuneration of the President * * * shall be disclosed and premium shall be paid thereon' * * *."

The Court concedes that the last sentence of Paragraph FIVE supports defendant's interpretation of that paragraph, namely, that corporate officers are entitled to compensation under ONE (a) when injured while performing the work of a workman because the last sentence of Paragraph FIVE shows a purpose to collect premium only on that part of officers' salaries earned while performing the duties of a workman.

However, in considering Paragraph 6 (Trans. 18) of the Workmen's Compensation Endorsement in relation to the last sentence of Paragraph FIVE, the Court has entirely overlooked the fact that the corporate employer was entitled to indemnity under Paragraph ONE (b) of the policy and to the defense of litigation under Paragraph THREE (Trans. 4), on account of injuries suffered by executive officers while not performing workmen's duties, and that

under Paragraph FIVE standing alone the corporate employer was not charged any specific premium for this indemnity and defense protection under the policy.

This again illustrates the fundamental misapprehension of the primary purpose of the policy, *i.e.*, to provide compensation under the jurisdiction of the Illinois Act through Paragraph ONE (a) and to provide to the corporate employer indemnity and defense of common law litigation under Paragraph ONE (b), and that this policy was bought by the corporate employer for *its* own protection and was not an accident policy bought by Sindelar or anyone else in his individual capacity.

What was really accomplished by Paragraph SIX of the Workmen's Compensation Endorsement was that, instead of a corporate employer being furnished *gratis* with indemnity protection under Paragraph ONE (b) in connection with accidents suffered by executive officers while engaged in their executive duties, a charge for that protection was made by providing that all remuneration paid to officers, within certain limits, should be considered for premium purposes.

The Circuit Court of Appeals overlooks the fact that by a series of enactments culminating just before Paragraph 6 was added to the Endorsement, the Illinois Legislature compelled Insurance Carriers to *guarantee* in their standard policies payments to Claimants under Paragraph ONE (b) where the employer should be insolvent, *Kinnan* v. *Globe*, 233 Ill. App. 451.

The insurance company certainly was entitled to a premium charge for this ONE (b) protection afforded to the corporate employer and the manner of arriving at it, whether it be by a percentage of the payroll, or by flat charge, or by any other combination of factors, is entirely immaterial.

We think, therefore, that if the Circuit Court of Appeals' attention had been focused on the existence of the indemnity and defense obligations assumed by the insur-

ance company under Paragraphs ONE (b) and THREE, (Trans. 4) in favor of the corporate employer, the Court would have appreciated the correctness of our explanation of the premium charge provision of the policy and would not have sought to attribute some unusual significance to Paragraph 6 (Trans. 18) of the Workmen's Compensation Endorsement, and would not have stated in its opinion that Paragraph 6 nullified the defendant's approach to the correct meaning of Paragraph FIVE of the policy.

In view of this explanation, it is difficult to comprehend how the requirement that the employer pay a premium for indemnity and defense under Paragraphs ONE (b) and THREE of the policy, which *previously* had been furnished without a specific premium charge, should be construed as changing the fundamental purposes of the policy, so as to extend it, with respect to officers while doing official work, from an indemnity contract for the protection of the corporate employer to a purely voluntary accident policy for the benefit of corporate officers.

Point 7.

In deciding that ambiguity exists in the policy that warranted the conclusion that paragraph five extends benefits to executive officers on a voluntary plan outside the jurisdiction of the Illinois Compensation Act, the Circuit Court of Appeals overlooked the rule of law recently enunciated by the United States Supreme Court in American Stevedores, Inc. v. Porello, 67 Sup. Ct. 847.

We are confident that upon consideration of this matter in the light of the grounds discussed above, the Supreme Court will agree with us that the over-all structure and meaning of the policy is simple and readily apparent, whereas, in seeking to interpret it as the Respondents do, it is necessary to grope about and make hair-line distinctions in an attempt to reach a result that was plainly not intended either by the insurance company or by the corporation that purchased the policy.

It is significant, we think, that nowhere in the Circuit Court of Appeals' opinion is there any discussion of what the parties to this contract actually intended to accomplish by its provisions. We did not discuss it heretofore, because it appeared to us, as it did to the District Judge, that the intention of the parties was clear from the very words of the policy. However, now that the Circuit Court of Appeals has declared that the policy is ambiguous, and has held that this complaint states a good cause of action (which we do not admit), we find ourselves foreclosed from proving, at the trial of this action, what the insurance company which sold the policy, and the corporate employer which bought the policy, really intended.

After our briefs had been filed with the Circuit Court of Appeals, the Supreme Court of the United States decided *American Stevedores, Inc.* v. *Porello*, 67 Sup. Ct. 847. That case involved the construction of an indemnity clause in a contract prepared by the Government, and to which the Government and the stevedoring company were parties. Each party contended that certain words in the contract had an opposite meaning. The Court held that the clause in question was ambiguous, but did not apply the rule of resolving ambiguities against the party that drew the contract. Instead, the Supreme Court held that evidence should have been taken as to the intention of the parties and remanded the case to the District Court, so that that Court would have the benefit of such evidence as there would be on the intention of the parties in determining the meaning of the contract.

This Petitioner is ready and willing to produce, at the trial of this action, evidence showing that neither it nor the corporate employer who bought the policy, ever intended by the policy or by the wording of Paragraph FIVE to provide to officers of the insured, accidentally injured while performing executive duties, for which they would have no remedy under the Illinois Workmen's Compensation Act, compensation under any scheme or plan similar to that provided by the Illinois Compensation Law.

At the very least, in a case where, as here, these Respondents seek to come under the policy on a third-party-beneficiary theory and to establish rights under it on the strength of alleged ambiguities in the policy, the party that sold the policy and the one that bought it, should be given an opportunity to prove what was intended. The Supreme Court concluded that this was only fair in the *Porello* case where the conflicting interpretations were only between the parties who signed the agreement.

It is one thing to interpret all ambiguities in favor of an insured who is clearly an insured under the policy, but an entirely different and more serious matter to rely upon alleged ambiguities as an instrument for conferring the rights of an insured upon the party asserting the alleged ambiguities, especially in the face of the very words of the concluding sentence of Paragraph ONE (a) of the policy that it is not to be construed to embrace any *scheme* or *plan* not cited in an endorsement attached thereto.

If ambiguities are to be relied on in a situation such as this to give these Respondents the rights they claim under the policy, the case clearly appears to be one which should be remanded to the District Court for the taking of evidence on the question of intention, as was done by the Supreme Court in the *Porello* case.

Point 8.

The reported cases, (other than the Duesenberg Case, 14 N. E. (2d) 919), are entirely consistent with and support the petitioner's construction of its policy.

We have the following comments on the cases discussed in the Court's opinion:

(1) *Morris* v. *Central West Casualty Company,* 351 Ill. 40, discussed in Page 8 of this Court's opinion (Trans. 60), at least is entirely consistent with our interpretation of this policy and is a clear example of the need of a separate endorsement to the policy to extend it to include a *scheme*

or *plan* for the voluntary payment of benefits in order to avoid the *prohibition* of any such *scheme* found in the concluding sentence of Paragraph ONE (a) of the policy. Cf. POINT 1, *supra.*

The *Morris* case is not decisive of the problem in our case. It contains nothing unfavorable to us. All it holds is that an individual employer may obtain voluntary compensation benefits, for himself, as a workman, equivalent to those payable under the Workmen's Compensation Act if those benefits are granted to him by an *endorsement* attached to the policy.

This Court's quotation (Opinion 9) (Trans. 61) clearly indicates that to collect, Morris had to be *doing the work of an employee.* In the case itself, the employer *raised this defense* and pleaded that Morris was *not* doing the work of an employee. The point was most bitterly contested, and, finally, the widow got in evidence to show that Morris, at the time of the accident, was hit by the tail-gate of his truck while he was unloading it, in the business of trucking goods, as described in the policy and in the rest of the endorsement. The Court made the *basis* of its opinion, that Morris was *actually doing the work of an employee,* and his widow was, therefore, entitled to compensation, as though he were under the Compensation Act; and the Court sets out this criterion of liability in the part quoted by this Court on page 9 of the Opinion. (Trans. 61)

(2) The Court admits that some of the reasoning in *Wood* v. *Employer's Liability Ins. Corp.,* 41 F. 2d 573, "appears to support defendant's argument." This is another case with an *endorsement* attached to the policy so as to overcome the prohibition against other *schemes* or *plans* contained in the concluding sentence of Paragraph ONE (a) of the policy. (Trans. 61)

Furthermore, the Court overlooked the parallel between the *Wood* case and the case at bar when it emphasized that there the employee was a farmer outside the Indiana Act and was not a corporate officer. In the case at bar, Mr.

Sindelar, while performing executive duties as an officer of the corporate employer, was just as much outside of the Illinois Act as the farm employee in the *Wood* case was outside the Indiana Act.

The endorsement in the *Wood* case was added to the policy, as required by the prohibition in the concluding sentence of Paragraph ONE (a), so as to provide a voluntary plan of benefits for farm employees who were outside the Indiana Act. Judge Sparks held that that endorsement did not go as far as claimed by the plaintiff there. As a matter of fact, we have no quarrel with the dissenting opinion in the *Wood* case where Judge Evans thought that the endorsement would provide voluntary benefits.

Our point is that whenever a Workmen's Compensation and Employer's Liability Policy *is* extended to provide voluntary benefits a *separate endorsement* is *required* whether the beneficiary is a farm employee or an executive of a corporation injured during the performance of his executive duties and that implicit in the *Wood* case is a recognition of this interpretation of the policy that we have advanced throughout this litigation.

(3) As far as *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is concerned, the problem of interpreting this policy is one which this Court is obliged to decide upon its own construction of the law of Illinois. There is no decision by any Illinois court on this specific question. The *Morris* case supports our contention, as above indicated, and in no way hampers this Court in deciding the question independently. The *Wood* case even though it involves an Indiana policy, is a proper precedent for this Court to follow in its independent determination of what the law of the State of Illinois is on this subject. (*Meredith* v. *City of Winter Haven,* 320 U. S. 228, 237; 64 S. Ct. 7, 12.)

(4) As for the Duesenberg cases which are given as authority for the Court's opinion, these have been analyzed *supra* at considerable length under POINT A of this argument and the Court is respectfully referred thereto.

CONCLUSION.

We recognize that applications for certiorari are a burden on the Court and are rarely granted and that it is counsel's duty not to make such an application unless he is convinced that the Court (below) has misconceived his arguments or overlooked or misapprehended important matters.

With the utmost deference to and respect for the Circuit Court of Appeals, we have attempted to specify separately and succinctly, the matters which we think furnish sound reasons for applying for this writ.

We are confident that if this Court, upon a study of this petition and brief, and upon further reflection, concludes that the several matters to which we have referred, because of the complexity of the problem and the manner of presentation, were overlooked or misapprehended, it will not hesitate to direct the Circuit Court of Appeals to either affirm the judgment of the District Court or remand the case to that Court for evidence as to the intention of the parties.

It is, therefore, respectfully urged that a writ of certiorari should be granted.

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